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THE RISE AND FALL OF THE BREADWINNER CITIZEN, AS REFLECTED IN DUTCH AND EU MIGRATION LAW

Sarah van Walsum*

Introduction

Family migration is a hot issue in many of the EU member states. More and more member states are introducing income requirements to ensure that family migrants will not have to rely on public funds, language and 'civil knowledge' tests to ensure their successful integration, and minimum age limits to help prevent forced marriages. At the same time, family migration is, to a growing degree, being regulated through EU law. In particular, EU citizens who have made use of their right to freedom of movement within the EU can appeal to EU directive 2004/38 (the Citizenship Directive). Largely stemming from the case law of the EU Court of Justice (ECJ), these mobile EU citizens have acquired extensive rights to family reunification that countervail the restrictive measures, described above, that are being introduced by various member states, the Netherlands among them.

In my book *The Family and the Nation*,¹ I defend the thesis that family migration policies reflect certain assumptions regarding family norms and regarding the relationship between family and state. These assumptions are moreover relevant for notions of substantive citizenship. In this article, I will compare how linked assumptions concerning family and citizenship have informed Dutch family migration policies in the past to how these linked assumptions inform migration policies in the present. I will then review the case law of the ECJ to see to what extent it does or does not reflect the same underlying assumptions concerning family relations. Finally, I shall reflect on what this case law may tell us about the ECJ's perspective on substantive EU citizenship.

I. A Brief Biography of the Breadwinner Citizen as Chief Addressee of the Dutch Welfare State

In the first chapter of *The Family and the Nation*, I discuss the changes that have occurred, in the Netherlands, in dominant family norms, and what these

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¹ S. van Walsum, *The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms*, Cambridge: Cambridge Scholars Publishing 2008.

changes have meant for the notion of the citizen as an active and responsible member of the national community.

I trace how, in the period of reconstruction that immediately followed the Second World War, the Dutch established a modern welfare state that took the nuclear family as its basic unit. The male breadwinner and head of the family was the chief addressee of the welfare state as an economic project of redistribution. He received the family wage and benefits under public housing, health insurance, and social insurance schemes. Ultimately, welfare benefits were all meant to ensure that he could fulfil his financial obligations as a breadwinner.²

At the same time, his wife formed the subject of a moral project of modernity. Initially through religious institutions but increasingly through secular and professional social services, it was through wives and mothers that Dutch society was groomed for the post-war industrialized consumer society.³ Even though the work women performed in the home was not validated in economic terms, it was validated in moral terms. Although subordinate to and dependent on her husband, the male breadwinner, the wife and mother was, nonetheless, relevant for the notion of citizenship that he stood for. Without a family to support, a wife to tame and support him, and to act as a mother who could pass on the virtues of citizenship to his children, he was no true and proper citizen. As long as he remained emblematic of substantive citizenship, preserving the unity of the male breadwinner's family remained a key principle of Dutch nationality and migration law. His family unit was included in the Dutch nation; those of his foreign counterparts were excluded and attributed to their own nations. Foreign women who married Dutch men automatically acquired the Dutch nationality. Dutch women who married foreign men automatically lost it.⁴

All this changed in the 1960s and 70s. The Netherlands had signed international treaties guaranteeing equal rights for men and women. As of 1965, Dutch women acquired the right to maintain their nationality after marriage, and foreign women no longer automatically became Dutch after marrying a Dutchman – although for them it would remain far simpler to acquire Dutch nationality than for Dutch women's foreign husbands. It would take until 1985 before men and women would be treated on completely equal terms in Dutch nationality law.⁵

² J. Bussemaker, *Betwiste zelfstandigheid. Individualisering, sekse en verzorgingsstaat*, Amsterdam: SUA 1993. R. Holtmaat, *Met zorg een recht? Een analyse van het politiek-juridische vertoog over bijstandsrecht*, Zwolle: Tjeenk Willink 1992.

³ M. Gastelaars, *Een geregeld leven. Sociologie en sociale politiek in Nederland 1925-1968*, Amsterdam: SUA 1985.

⁴ B. de Hart, *Onbezonnen vrouwen: gemengde relaties in het nationaliteitsrecht en het vreemdelingenrecht*. Amsterdam: Aksant 2003.

⁵ *Ibid.*

In the course of the 1970s, the women's movement started to take hold in the Netherlands. The sexual revolution took off. Legal reforms and the introduction of welfare benefits made divorce a real option. Marriage as an institution was being put to the test. Initially, this moral ferment did not lead to significant changes in Dutch family law, for the simple reason that there was no consensus as to what the family was or should be.⁶ After much debate and legal procedures that went as far as the European Court of Human Rights, a new consensus was reached in the end. Since the early 1990s, Dutch family law has been reformed on a number of fronts. Unmarried couples can secure their mutual rights and obligations as extensively as married ones can. Homosexuals enjoy nearly all the same rights as heterosexual partners. The relationship between parents and children has been rephrased in terms that allow for various forms of parenting in various combinations and various degrees of intensity. Family life is no longer shaped by a religiously determined morality, but has been made subject to individual tastes and inclinations – no longer prescribed but a matter of choice.⁷

All individuals are now assumed to support themselves and paid labour, rather than family relations, has become the major, and by now it would seem the only, vector to social participation and substantive citizenship.⁸ Providing unpaid care is no longer seen as the essence of (subordinate) female citizenship and social security provisions no longer compensate for women's unpaid commitment to care. Neither, however, has care been reformulated as a collective responsibility of the state. A comparative study of social policies in ten different Western European states shows that the Netherlands provides working parents relatively little support in the way of subsidized child care or parental leave.⁹ The new model citizen is expected to be readily available for the labour market, unhampered by burdens of care.

As the public/private divide between the genders is becoming less marked, a new hierarchy seems to be emerging in the labour market. Significantly, since the mid-1990s, there has been a steady increase in the number of persons hired on a part-time basis, of independently employed persons, of persons working on temporary contracts, and of persons hired through employment agencies. The combined statistics of the *Uitvoeringsinstituut Werknemersverzekeringen* (UWV, the organization that administers all of the formal social security

⁶ Bussemaker *supra* note 2.; See also G. Kooy, *Seksualiteit, huwelijk en gezin in Nederland*. Deventer: Van Loghum Slaterus 1975.

⁷ S. Wortmann, 'Kroniek van het personen- en familierecht', *Nederlands Juristenblad* 2000-31, pp. 1584-1593.

⁸ T. Knijn & P. Cuyvers, 'Onduidelijke signalen, duidelijke effecten: gezinsbeleid in Nederland', in: S. Grotenhuis, T. Knijn, T. Korver, E. Tonkens & J. van der Zwaard (eds.), *Hoeksteen of zwerfkei. Het moderne gezin tussen individualisering en pedagogisering*, Amsterdam: De Balie 2002, pp. 37-54.

⁹ H. Schultze & T. Hartmann, 'What happened to the European family in the 1980s? The polarization between the family and other forms of private life' in: F. Kaufmann *et. al.* (eds.), *Family Life and Family Policies in Europe. Volume 2. Problems and Issues in Comparative Perspective*, Oxford: Oxford University Press 2002, pp. 69-119.

schemes in the Netherlands) and of Statistics Netherlands, indicate that more than 13 percent of the current working population in the Netherlands are self-employed, while more than 25 percent of those in salaried employment are hired on a temporary basis. The figures also show that these two categories have grown in importance over the past ten years, and that they run the highest risk of becoming unemployed in periods of recession.¹⁰

In the sector of home-based care, which accounts for more than 200,000 workers,¹¹ employees with full benefits have, since the sector was reorganised in 2007, been largely replaced by quasi-self-employed workers.¹² The exclusion of home care workers and workers in household services from employee benefits has a long tradition in the Netherlands, and has in the past been justified with the argument that this sector employs almost exclusively women who, being able to depend on a breadwinner, have no need for unemployment insurance and other such benefits.

Nowadays their exclusion from employee benefits is justified by redefining them as entrepreneurial providers of personal services, who are capable of managing their own risks. At the same time, the norm of the full-time, permanently employed and fully insured breadwinner is being abandoned by other sectors as well, and not only those dominated by female employment. In the postal sector that – formerly at least – hired many men, full-time workers on permanent contract are now being replaced by part-timers and/or people hired as quasi independents.¹³ Recruitment folders of TNT, one of the major mail delivery services in the Netherlands, promote the mail delivery cart as the ‘logical sequel to the baby-buggy.’ What these developments imply is that the family wage and the associated benefits of unemployment insurance, old age pensions, etc. are no longer as self-evident as they once were. While providing full-time home-based care is no longer acknowledged as the legitimate occupation for female citizens, the former male ideal of the breadwinner citizen threatens to become an elusive goal as well.

II. The Breadwinner Citizen in Dutch Migration Law: an Increasingly Ambiguous Figure

In the same period that family norms were being hotly contested in the Netherlands in the 1970s and 80s, the position of migrants within Dutch society was becoming a political issue, that is: their cultural and religious rights, their right to settle and be joined by their families, their right to legal inclusion through a secure residence status and easy access to naturalization. These discussions were carried out in a context of accelerated decolonization and

¹⁰ Appendix 3 SER 2010, p. 4.

¹¹ Arbeidsinspectie: Verslag inspectierapport Thuiszorg A 694. Onderwerpen: fysieke belasting; agressie en geweld. The Hague: 2006.

¹² L. Bijleveld & E. Cremers, *Een baan als alle andere? De rechtspositie van deeltijd huishoudelijk personeel*, Leiden: Vereniging voor Vrouw en Recht Clara Wichmann, 2010.

¹³ See for example, NRC 30 September 2010: De slechtste CAO van Nederland. Postmarkt. Gesprekken over sociale zekerheden voor postbezorgers lopen stuk.

anti-racist activism. According to the dominant discourse of the time, the Netherlands was a multicultural society, in which no cultural tradition was promoted as superior to any other.¹⁴ As long as Dutch male citizens still held a strong claim to the protection of their family rights, limiting male migrants' rights to family reunification was problematic. And as long as cultural rights were protected, family ties associated with those rights enjoyed protection as well.

By the early 1990s the multicultural honeymoon was over. In the same period that a new consensus was finally being reached in the Netherlands on the rules of family law, a new interest also emerged in the notion of citizenship as an expression of national identity and cohesion. Having and maintaining cultural rights as an ethnic minority was no longer seen as a right, but as a hindrance to effective participation in the dominant society.¹⁵ This implied a policy of assimilation, but in order for minorities to be assimilated, there had to be a normative framework for them to conform to. This normative framework was largely found in the norms that informed the emerging consensus on family law: equality between the sexes, sexual freedom, the individual right to choose and the individual responsibility that this implied. As in the contemporaneous discourse on social security, in the emerging discourse on integration too, civic participation came to be primarily defined in terms of paid labour.¹⁶ Issues of faith and minority culture were relegated to the private sphere.¹⁷

The liberal and secular terms that came to inform Dutch family law produced a new touchstone of Dutch identity that made it possible to construct migrant identity as its antithesis, defined in terms that are patriarchal, sexist, religiously bound and gendered. *He* is lacking in the individualist spirit and self-sufficiency required by our modern, competitive and market-driven society; *she* is passive, poorly educated and submissive, incapable of raising her children to join the new breed of citizens. *He* forms a threat to her emancipation, so *she* should be excluded in her own interests. *She* forms a threat to the nation's future, so her exclusion can be justified in the interest of the nation.

This message is very explicitly conveyed by proposals that the former Dutch cabinet sent to Dutch parliament last autumn for further restrictions on family migration.¹⁸ Those men who are depicted as deliberately choosing to marry a foreign bride because they expect she will be less emancipated, more compliant, subservient and 'willing to provide sexual services' than a woman raised in the Netherlands, are accused of displaying an attitude that "does not coincide with the Dutch premise of equality within marriage."¹⁹ The

¹⁴ W. Tinnemans, *Een gouden armband: Een geschiedenis van mediterrane immigranten in Nederland (1945-1994)*, Utrecht: Nederlands Centrum Buitenlanders 1994.

¹⁵ Kamerstukken II 1993/94, 23684, nr. 2.

¹⁶ Verwey-Jonker Instituut, *Bronnenstudie Integratiebeleid. Deelrapport 1: Het integratiebeleid 1970 tot 2002 op hoofdlijnen*, Utrecht: Verwey-Jonker Instituut 2003.

¹⁷ L. Mulder, 'Hollandse nieuwe', *Migrantenrecht 1994* 1994-8, pp. 157-162.

¹⁸ Kamerstukken II 2009/10, 32 175, nr. 1.

¹⁹ *Ibid.* p. 6.

recommended restrictive measures are repressive in nature, aiming to tighten control and widen the scope for criminal sanctions.

Looking back on the past 25 years, it is striking to note that the category of migrants that was automatically included in the Dutch nation up until 1985 is now being presented as the most problematic candidate for inclusion: the foreign bride of a Dutch national.

Yet while they promote the new individualistic and egalitarian family norms as being ‘typically Dutch’, these same proposals also suggest aspiring family migrants should comply with the norm of the breadwinner citizen and his dependent spouse. The spouse in the Netherlands should be required to have a steady job, earning more than minimum wage, and to have a certain level of education, so as to be able to provide the foreign spouse with a ‘stable future’, while the foreign spouse’s right to stay is kept dependent on the ongoing stability of the relationship. The current cabinet even proposes to extend this period of dependency from three to five years.²⁰

Thus, the breadwinner citizen plays an ambiguous role in current Dutch discourse on migration law. While being confirmed as a model of civic responsibility, he at the same time serves to mark and exclude the undesirable migrant as everything that the modern day Dutch citizen is not. Those who aspire to the ideal of a full-time steady breadwinner, but cannot reach it, can find comfort in the message that the welfare state has been and is being purged of the evils of patriarchy, while the breadwinner citizen nonetheless remains its darling and chief addressee, deserving of the privileges and security that this implies.

III. Family and Citizenship in EU Migration Law

A serious obstacle to achieving the kind of reforms proposed by the former (and current) Dutch cabinets is the current state of EU migration law. Dutch citizens who wish to circumvent Dutch restrictions on family migration can do so by moving to another EU member state. Once settled there, they can request the admission of their foreign family member on the grounds of EU law, which is considerably more liberal in this respect than Dutch law. Once the foreign family member has gained entry, the entire family can – in due course – return to the Netherlands, again on the basis of EU, not national, migration law. This tactic is sometimes referred to as the ‘U-turn’.²¹

That EU laws on the freedom of movement within the EU should trump national rules regulating family migration to the EU is not an obvious matter. In

²⁰ VVD-PVV-CDA Coalition and Parliamentary Support Agreement.

²¹ D. Chalmers, *et. al. European Union Law (Second Edition)*, Cambridge: Cambridge University Press 2010, pp. 470-473.

fact, this was and still is a contested issue.²² Following the judgement of the ECJ in the *Akrich* case, it initially looked like member states would maintain jurisdiction over family migration from third countries into the EU, and that EU law would only apply to third-country nationals who were already legally residing in one of the EU member states, but wished to accompany an EU-citizen family member to another member state.²³

In 2004, the EU Directive 2004/38 (the Citizenship Directive) on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states was adopted. This formed a single codification of all previous legislation on the freedom of movement within the EU. The European legislator could have taken this opportunity to integrate the *Akrich* judgement into this directive, however it did not do so. Article 3 of the directive stipulates in paragraph 1 that the directive is to “apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members, as defined in point 2 of Article 2 of the directive, who accompany *or join them*.”²⁴

In the *Metock* judgement of 25 July 2008, the ECJ ruled that family members from third countries could claim residence rights on the basis of this directive, regardless of whether or not they had already been admitted to reside in one of the EU member states.²⁵ This case concerned four rejected asylum seekers, all originating from West Africa. All four of them were married to women who resided in Ireland, but held nationalities of other EU member states. Their wives’ claims to freedom of movement fell under the jurisdiction of EU law. The question was whether their claims included residence rights for a husband who had been refused admission to one of the EU member states. The Irish state, referring to the earlier decision in *Akrich*, decided that this could not be the case. In its judgement, the ECJ explicitly rejected its earlier position in *Akrich* and referred to the newly implemented Directive 2004/38, stating that “if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed”²⁶ and that “as recital 5 in the preamble to Directive 2004/38 points out, the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of dignity, be also granted to their family members, irrespective of nationality.”²⁷

In effect, the decision in *Metock* amounted to an official acceptance of the legitimacy of the U-turn tactic described above. This implies a considerable

²² See the diametrically opposed opinions of advocate general Sharpston in the *Ruiz Zambrano* case (C-34/09) and of advocate general Kokott in *McCarthy* case (C-434/09), both of which are currently pending in Luxembourg.

²³ C-109/01 *Akrich* [2003] ECR I-9607. See also Chalmers *supra* note 21, p. 470.

²⁴ EU Citizens Directive 2004/38/EC, Art. 3 (1) (emphasis included).

²⁵ C-127/08 *Metock* [2008] ECR I-6241. See also Chalmers *supra* note 21, pp. 470-1.

²⁶ *Ibid.* para. 60.

²⁷ *Ibid.* para. 83.

restraint on member states' control over family migration by third country nationals. Admittedly, the member states may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience. However until now, the ECJ has interpreted the freedom of member states to refuse admission on such grounds in a restrictive fashion. The single fact that the citizen of one EU member state has moved to another in order to be able to claim rights under EU law for his or her third country family members is not enough to establish abuse of rights.²⁸

Interestingly, the ECJ not only associates the right to 'lead a normal family life' with EU citizenship, it also links care provided within the family to the fundamental freedoms associated with EU citizenship. Thus, in the *Carpenter* case, the ECJ ruled that a British salesman would be hindered in his freedom to provide services throughout the EU, if his Filipino wife was unable to stay in his home in the UK and look after his children while he was on the road.²⁹ In the *Chen* case, the ECJ ruled that an Irish infant would not be able to effectively enjoy her right to reside in the UK unless her Chinese mother, her care provider, was able to reside there with her.³⁰ In the *Baumbast* case, the ECJ ruled that the child of an EU citizen who had made use of his or her freedom to work in another EU member state has an independent right to remain in that member state and receive an education there, even if the EU-citizen parent has moved elsewhere. Again, the care-providing parent shares in this right, regardless of his or her nationality.³¹ This will even be the case if the care-providing parent has no independent source of income and must appeal to the member state involved for welfare benefits.³²

IV. Exit the Breadwinner Citizen?

EU family migration law differs from that of the Netherlands on a number of essential points. First, the enjoyment of family life is inherent to the enjoyment of EU citizenship, *i.e.* an EU citizen must be able to enjoy the fundamental rights and freedoms inherent to EU citizenship without having to subject him or herself to interference in family life, unless there are pressing issues of public order or national security at stake. Whether or not the family conforms to specific cultural norms is immaterial.³³ Second, care work provided in the context of family relations is a necessary prerequisite for the practical realisation of the fundamental rights and freedoms guaranteed by EU law, *i.e.* this work has material value for the effective realisation of free movement within the EU economy, and for the reproduction of EU workers, that must be acknowledged and, if need be, paid for by the member states.³⁴ Third, minors

²⁸ *Akrich*, para. 111. See also Chalmers *supra* note 21, p. 472.

²⁹ C-60/00 *Carpenter* [2002] ECR I-6279.

³⁰ C-200/02 *Chen* [2004] ECR I-9925.

³¹ C-413/99 *Baumbast* [2002] ECR I-7091.

³² C-480/08 *Texeira* 23 February 2010.

³³ *Metock supra* note 25.

³⁴ See the cases *Carpenter Baumbast*, and *Texeira*.

have an independent right as EU citizens to the fundamental freedoms of movement, residence and use of services within the EU. On the one hand, member states may not make this right dependent on the continued residence of a parent with EU citizenship; on the other hand, member states must render this right effective by allowing for the residence of the care-providing parent, regardless of whether or not (s)he is an EU citizen. Moreover, general case law on the freedom of movement makes it clear that to be acknowledged as an economic actor and hence to be entitled to the fundamental freedom of movement for work or the provision of services, one need not qualify as a breadwinner – any work performed on a regular basis in exchange for money is sufficient to allow one to qualify.³⁵ Finally, any EU citizen who does not make use of social benefits should be considered self-supporting, regardless of the level of his or her personal income or its source and hence the citizen can appeal to his or her right to settle in any given EU nation.³⁶

The case law of the ECJ projects a notion of citizenship that differs both from the breadwinner citizen, and from the self-supporting individual currently promoted through Dutch social security and integration policies. The emerging EU notion of citizenship is not shaped by a gendered hierarchy but does include family life and care labour as constitutive elements. It acknowledges the need for states to protect themselves from excessive demands on their financial resources, but does not link human labour to a family (or even a survival) wage. Rather, the price of labour is linked to an individual's productive capacity; not to reproductive needs. The EU Court of Justice, champion of free market liberalism, seems to focus on individual labour as an expression of productive endeavour rather than as a source of (family) income.

This approach has important implications for Dutch family migration policies. As discussed above, the breadwinner citizen still plays a significant, if ambiguous, role in those policies. On the one hand, the contours of the Dutch nation are now being defined in opposition to patriarchal hierarchies shaped in the breadwinner citizen's image. On the other hand, the breadwinner citizen still serves as a model of civic virtue, belying the fact that the family wage and the full-time permanent job seem to be on their way to becoming things of the past.

Conclusion

It remains to be seen where exactly the ECJ's perspective on the nature of citizenship is now bringing us. Is it focussed on establishing a supra-national regime meant to endow EU citizens with specific claims to human rights, or is it after all primarily aimed at creating a 'level playing field' to facilitate an

³⁵ M. Kraamwinkel, 'The Imagined European Community: Are Housewives European Citizens?', in: J. Conaghan, R.M. Fischl & K. Klare (eds.), *Labour Law in an Era of Globalization. Transformative Practices and Possibilities*, Oxford: Oxford University Press, pp. 321-338.

³⁶ E. Hilbrink, 'Het middenenvereiste in EU-rechtelijk perspectief', *Jaartal Vreemdelingenrecht* 2010, nr. 1/2.

increasingly mobile and flexible economic order?³⁷ If the case law of the ECJ has implications for how the borders of the EU are to be drawn, it will have implications for human relations within those borders as well. At first glance it does seem to offer new opportunities to validate, without cultural prejudice, family relations and the care work these imply. But it also suggests a reconfiguration between (European) state and family in controlling reproductive labour,³⁸ and between (European) state and market in controlling productive labour.³⁹ Whatever else it implies, it seems to spell the end of the male breadwinner citizen, and the associated ideal of the full-time permanent family wage earning employee, as model citizen and chief addressee of the national welfare state.

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³⁷ Sharpston and Kokott *supra* note 22.

³⁸ See W. Brown, *States of Injury: Power and Freedom in Late Modernity*, Princeton: Princeton University Press 1995.

³⁹ M. Barea & C. Cesana, *La protection sociale en Europe*, Maastricht: Institut Européen d'Administration Publique 2003.